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No. 61466-5-I

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

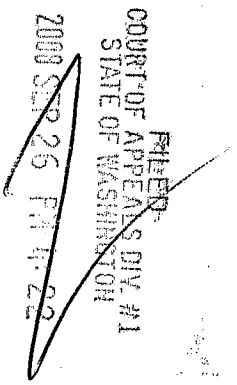
MICHAEL MORGAN,
Appellant/Cross-Respondent,

v.

CITY OF FEDERAL WAY, et al.,
Respondents/Cross-Appellants

&

TACOMA NEWS, INC.,
Intervenor/Respondent



REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS CITY OF FEDERAL WAY, ET AL. IN SUPPORT OF CITY'S CROSS-APPEAL

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1. INTRODUCTION

The City of Federal Way's ("City") cross-appeal requires this Court to determine whether a public entity can ever collect its attorney fees when a third party improperly obtains an injunction under the Public Records Act ("PRA"). Such an injunction wrongfully prohibits the public entity from releasing records in response to a public records request, in contravention of the State public policies mandated by the PRA. The Supreme Court has stated that trial courts **do** have the authority to award a public entity its attorney fees. But here, the trial court adopted a rule that would prohibit fees under all circumstances. The trial court thus abused its discretion by apply the wrong legal standard. This Court should vacate the order denying fees and remand to the trial court so it can reconsider its ruling, applying the proper legal standard.

2. SUMMARY OF FACTS RELEVANT TO CITY'S CROSS-APPEAL

The City's initial brief provides a complete statement of the case. For the purpose of this reply brief, the relevant facts are briefly summarized below:

- Judge Morgan had repeated contacts with the City about the pending public records request and the City's intent to release the Stephson Report, exchanging no less than six letters, including four the day before Judge Morgan obtained the injunction. CP 72¶10, 278-79.

- Judge Morgan did not inform the City about the TRO hearing. CP 49 ¶4.9, 72 ¶10; RP (3/19 Argument) 30:13-18; RP (3/19 Decision) at 5:17-23.

- Judge Morgan (through his counsel)[1] obtained the injunction by expressly telling the commissioner that the City had notice and had chosen not to send someone to the hearing. RP (3/5) at 20.

- When the City and the trial court raised the issue of lack of notice at the hearing on March 19, Judge Morgan and his counsel remained silent and failed to explain that they had falsely told the commissioner notice had been provided. RP (3/19 Argument) at 30:13-18.

- The trial court denied the City's request for attorney fees, ruling that fees should not be awarded because "a trial on the merits would have been fruitless if the records had already been disclosed." CP 430.

3. ARGUMENT ON CITY'S CROSS-APPEAL

3.1 A Court Has the Authority to Award Attorney Fees When an Injunction Is Wrongfully Issued in a Third-Party PRA Suit

The trial court's ruling denying the City attorney fees is based on the trial court's ruling that, in effect, attorney fees can never be awarded in third-party PRA suits – a suit where a third party sues a public agency for an injunction to block the agency from releasing records. See RCW 42.56.540. This ruling directly contradicts the Supreme Court's and

[1] By referring to "Judge Morgan," the City is not seeking to imply Judge Morgan himself made false statements to the commissioner. Judge Morgan is, however, responsible for his attorneys' actions. Judge Morgan's appellate counsel was not the counsel representing Judge Morgan before the commissioner.

this Court's statements that such fees may be awarded in third-party PRA suits:

- "actual costs and attorney fees . . . may be awarded where a party succeeds in getting a wrongfully issued injunction dissolved." *Spokane Police Guild v. Wash. State Liquor Control Board*, 112 Wn.2d 30, 35, 769 P.2d 283 (1989)

- "Attorney's fees are recoverable as a cost of dissolving a wrongfully issued temporary injunction or restraining order." *Seattle Firefighters Union v. Hollister*, 48 Wn. App. 129, 138, 737 P.2d 1302 (1987)

- "[i]f fees were to be awarded based on this equitable rule, they would be limited to those necessary to dissolve the temporary restraining order, not those connected with the appeal." *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 758-59, 958 P.2d 260 (1998) (citing *Seattle Firefighters*)[2]

3.2 A Court Abuses Its Discretion When It Misapplies the Law

There can be no question that the application of the wrong legal standards or the misapplication of those standards amount to an abuse of discretion by a trial court.

"It is frequently said that a trial court abuses its discretion when it applies the wrong law." *Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, -- Wn. App. --, 187 P.3d 291, 301 (2008) (citing *State v. Lord,* 161 Wn.2d 276, 284, 165 P.3d 1251 (2007) (a trial court abuses its discretion when it

[2] As this quote indicated, a party is only entitled to fees incurred in dissolving the improper injunction. Thus, the City is **not** seeking fees on appeal.

applies the wrong legal standard)); *see also, e.g., Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006) ("An abuse of discretion is found if the trial court . . . applies the wrong legal standard, or bases its ruling on an erroneous view of the law."); *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) ("A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court . . . applies the wrong legal standard[.]"); *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) ("A decision is based 'on untenable grounds' or made 'for untenable reasons' if it . . . was reached by applying the wrong legal standard.").

Here, the trial court misapplied the law by effectively concluding it could not award attorney fees in any third-party PRA suit. This is incorrect and amounted to an abuse of discretion.

3.3 The Trial Court Misapplied the Law by Adopting a Ruling that Prohibits Attorney Fees in All Third-Party PRA Suits

The trial court's order denying fees rests on one of two bases – both of which result in a blanket ban on the award of attorney fees in third-party PRA suits. The first basis for the trial court's ruling is that it treated *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 758-59, 958 P.2d 260 (1998) as overruling *Seattle Firefighters Union v. Hollister*, 48 Wn. App. 129, 138, 737 P.2d 1302 (1987) (holding

that fees can be awarded in a third-party PRA suit). CP 430. Alternatively, the trial court held that fees should not be awarded because "a trial on the merits would have been fruitless if the records had already been disclosed." CP 431. Neither of these bases properly reflects the Court's holding in *Confederated Tribes* or is supportable.

In every third-party PRA suit, a trial on the merits would be fruitless if the records had already been disclosed. So under the trial court's reasoning, it could never award fees in a third-party PRA suit. This conclusion directly contradicts the Supreme Court's statements in *Spokane Police Guild* and *Confederated Tribes* and this Court's ruling in *Seattle Firefighters*. The trial court accordingly misapplied the law and abused its discretion.

The trial court's error stems from language in *Confederated Tribes*, which may appear internally inconsistent. The trial court seems to be ruling that one statement from the Supreme Court's decision in *Confederated Tribes* either overruled *Seattle Firefighters* or mandates no attorney fee award in third-party PRA suits:

> The purpose of the rule [allowing attorney fees for improperly issued injunctions] would not be served where injunctive relief prior to trial is necessary to preserve a party's right pending resolution of the action. Here, a trial on the merits would have been fruitless if the records had already been disclosed.

CP 430 ¶5 (quoting *Confederated Tribes*).

The Supreme Court did not intend this passage to overrule *Seattle Firefighters* because the Supreme Court cites favorably *Seattle Firefighters* in *Confederated Tribes*; it did not overrule it.[3] *Confederated Tribes*, 135 Wn.2d at 758. And the Supreme Court did not intend to create an absolute bar on attorney fees because in the sentence following the quotation above, the Supreme Court reiterated that fees can be awarded. *Confederated Tribes*, 135 Wn.2d at 758-59. The trial court misapplied *Confederated Tribes*. As a result, this matter must be remanded for reconsideration of attorney fees.

Judge Morgan argues that the trial court was simply exercising its discretion. But the trial court's reasoning applies in every third-party suit. This amounts to a blanket prohibition, and a misapplication of the law by the trial court.

3.4 Judge Morgan's False Statements to the Commissioner Were a "Plus" Factor that Justify an Award of Attorney Fees

As explained in the City's opening brief, in situations where injunctive relief is necessary to preserve a party's right to relief at trial, attorney fees can still be awarded when there is a "plus" factor – when the

[3] The trial court's block quote at CP 430 fails to indicate that the quotation is missing several sentences, which include the Supreme Court's favorable citation to *Seattle Firefighters*. Compare CP 430 ¶5 with *Confederated Tribes*, 135 Wn.2d at 758.

injunction is improperly issued (meaning it is vacated) **plus** under the circumstances, it was unreasonable for the party to obtain the injunction. See *Cornell Pump Co. v. City of Bellingham*, 123 Wn. App. 226, 98 P.3d 84 (2004) (awarding fees despite *Confederated Tribes*). Here, when Judge Morgan's counsel obtained the injunction by falsely telling the commissioner they had provided notice to the City and the City had elected not to attend, a "plus" factor is present.[4]

Accordingly, the Court should reverse the order denying fees with direction to the trial court making clear the trial court retains discretion to award fees and consider the application of the "plus" factor in its consideration of attorney fees.

4. CONCLUSION

Judge Morgan's counsel obtained an injunction by falsely informing the commissioner that they had provided notice to the City and the City had elected not to attend the hearing. Then, when the trial court noted the lack of an affidavit justifying the failure to provide notice, Judge Morgan remained silent, failing to explain why no such affidavit had been

[4] In Judge Morgan's response, he asserts his attorneys "mistakenly" told the commissioner that notice had been provided and there was "no need" for his attorneys to correct the misstatement at the March 19 hearing. Morgan's Response Brief at 32-33 & n. 23. Even assuming the false statement was not legally relevant – and certainly it was legally relevant – Judge Morgan's attorneys had a duty of candor to the court and should have corrected their false statement.

filed. This was unreasonable and warrants an award of attorney fees for the improperly issued injunction.

The trial court denied fees by adopting a ruling that would prohibit the award of attorney fees under all circumstances. This contradicts the Supreme Court's ruling in *Confederated Tribes* and thus amounted to an abuse of discretion. This Court should vacate the order denying fees and remand the matter to the trial court for its reconsideration of an award of attorney fees.

RESPECTFULLY SUBMITTED this 26th day of September, 2008.

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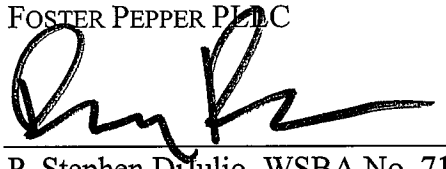

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